

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001**

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Date: August 25, 1997

Case No. 95 INA 672

In the Matter of:

MARGUERITE GORMAN,
Employer

on behalf of

ELZBIETA SOFIA SZOSTEK,
Alien

Appearance: P. W. Janaszek of New York, New York, Agent

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of MARGUERITE GORMAN (Alien) by ELZBIETA SOFIA SZOSTEK (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.²

STATEMENT OF THE CASE

This case involves an application (ETA 750A) for the permanent employment of the Alien as a Vegetarian Household Cook with the following duties:

Prepare, season, and cook meals according to the principles of vegetarian cuisine. Bake, broil, and steam fruits and vegetables. Prepare vegetarian meals such as baked eggplant, steamed zucchini, vegetable pierogis, blintzes, potato pancakes, borsht, cold beet soup. Prepare salads and salad sauces. Order foodstuffs. Serve meals. Clean kitchen and kitchen utensils. Account for expenses incurred.

The Employer specified in the ETA 750A that the Alien was to work a basic forty hour week without overtime anticipated. The hours offered are from 10:00 a.m. to 6:00 p.m., at \$12.81 per hour. The following statement from the Employer was appended to the form ETA 750A:

Please be advised that I have an opening for a position of Cook Vegetarian Live-Out in my household. I require a well balanced diet with low sodium, low cholesterol, low fat and low sugar contents because of my health condition. I am employed full time and only Cook Domestic Live-Out can provide a well balanced diet and purchase the necessary foodstuffs.

The opening I have at the present time is for full time, permanent position of Cook Live-Out.

I do not employ any US workers in my household. The cleaning duties are performed by members of my family

²Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

and an hourly worker who comes occasionally to my house. The meals at the present time are prepared by a relative who can not continue doing this because of personal reasons.

The Alien stated in the form ETA 750B that she was currently in the United States on a B-2 Visa, had worked as a Vegetarian Cook for a family in the United States for a period of two years and had been unemployed for the past six months.

Notice of Findings. The CO stated in the Notice of Findings (NOF) that the application for alien certification would be denied, subject to Employer's rebuttal, on grounds that the duties described in the ETA 750A did not appear to constitute the full time work required by 20 CFR § 656.3. The CO instructed the Employer to rebut this finding by amending the job duties or by submitting evidence that the job constitutes permanent full time employment and the position has been customarily required by the Employer. The CO directed that the rebuttal evidence should include the following:

State the number of meals prepared daily and weekly;
the length of time required to prepare each meal;
identify the individuals for whom the worker is
preparing each meal on a daily and weekly basis;
provide a representative one week schedule accounting
for eight hours per day/40 hours per week.

If you are claiming you need to employ a cook on a full-time basis because you entertain frequently, you must describe in detail the frequency of household entertaining during the preceding twelve (12) month period. List the dates of entertainment, the nature of the entertainment, guests, the number of meals served, the time and duration of the meal, etc.

Will the worker be required to perform duties other than cooking, i.e., houseworker, child care, home attendant? If yes, list each duty and the frequency of performance.

[Provide] [e]vidence [that the] employer has employed full-time cooks in the past, i.e., copies of tax and/or social security report forms. If it is your position that a "relative" has been performing these duties, you must supply evidence to support that this "relative" was performing cooking duties exclusively eight hours per day, five days/forty hours per week. Please indicate when this "relative" started performing these duties.

Who will perform the general household maintenance

duties, such as cleaning, laundry, vacuuming, etc.? If it is your position that the cleaning duties are performed by an "hourly worker who comes once per week", you must supply evidence to support, i.e., bills and canceled checks for the last 12 months.

[Provide any other information and evidence that clearly establishes and demonstrates that this is a permanent, full-time job offer that employer customarily has required.

The CO also requested evidence as to the care to be provided any children in the Employer's household while the parents were absent from the home.

Rebuttal. In response the Employer reported that both she and her husband were employed from 9:00 a.m. to 5:00 p.m. in positions "with a tremendous responsibility associated with money management." She said that because of their vegetarian diets, they have a need to eat more often than people who are not vegetarians. Accordingly, she said the cook will be required to prepare lunches for her and her husband to consume Tuesday through Sunday; mid-afternoon meals for the two of them on Tuesday through Thursday; dinners for the two of them to consume each evening; an evening supper for her and her husband to be consumed each evening; and ten to fifteen dinners for the ten to fifteen business associates whom they regularly entertain to consume on Tuesday and Thursday evenings.

The Employer's rebuttal further represented that an unidentified relative had cooked for them for more than twelve months without monetary remuneration, but no longer was doing so because she had accepted gainful employment elsewhere. As to the maintenance of the household, the Employer said they no longer employed anyone to assist with these tasks and that they, themselves, were presently performing that work and planned to continue to do so in the future.

Employer's rebuttal did not provide a specific schedule for the work the cook would be expected to perform. The Employer said the cook would prepare the above-described meals, shop for foodstuffs, account for expenses, and clean the kitchen and the cooking utensils between the hours of 10:00 a.m. and 6:00 p.m., from Monday through Friday, taking a one hour break each day. The Employer's rebuttal included copies of several recipes that the Employer said illustrated the time that would be required for preparation of vegetarian dishes. They included potato and parsnip kugel, carrot ring, vegetable loaf, babka, and cheese-cake.

Final Determination. The CO's Final Determination denied the Employer certification on the grounds that the Employer failed to

meet the requirements of 20 CFR § 656. The CO said it did not appear that the work described in the Employer's rebuttal would require eight hours per day or forty hours per week. The CO then expressed suspicion that the Employer had created the position of Cook "solely for the purpose of qualifying the Alien for a visa as a skilled worker, the only household occupation which falls into the skilled worker category."

Appeal. The Employer then requested administrative review of the denial of her application, and the file was referred to the Board.

DISCUSSION

(1) As 20 CFR § 656.3 defines "Employment" as permanent full time work by an employee for an employer other than oneself, the first inquiry is whether the CO's request for specific information as to the Employer's job opening was reasonable. The DOT description of a Household Cook clearly identifies the position as limited to duties to be performed in the kitchen and dining room, and at the food market.

The DOT specifies that the work of a Household Cook requires a Specific Vocational Preparation time (SVP) of two years. Under current Immigration and Naturalization Service (INS) rules a position that requires two years of training or experience is defined as a "skilled" occupation, which carries with it a preferential visa status. On the other hand, a position that includes such general household duties as cleaning, laundry, and answering the telephone in addition to some cooking is classified by the DOT as a Household Worker, General, with an SVP of three months. As that is considered by INS to be unskilled work and has a lower visa status, an incentive may exist for an employer to misrepresent the duties that their household workers will in fact perform. Consequently, the Board has held it reasonable for a CO to require adequate proof that positions for household cooks are strictly limited to cooking on a full time basis. Dr. Daryao S. Khatri, 94 INA 016 (Mar. 31, 1995).³ This is particularly true where, as in the instant case, an employer has not in the past employed a household cook, no other household workers are to be employed, and the record does not clearly indicate how the household chores other than the cooking will be performed.

The Board also has held that an employer bears the burden of proving that a position is permanent and full time. Certification may be denied, if an employer's own evidence does not show

³Also see **Mr. & Mrs. Clifford Cummings**, 94 INA 008(Dec, 21, 1994); **Marianne Tamulevich**, 94 INA 054(Dec. 5, 1994); **Jane B. Horn**, 94 INA 006(Nov. 30, 1994).

that the position is permanent and full time. **Gerata Systems America, Inc.**, 88 INA 344 (Dec. 16, 1988). It follows that, if a CO reasonably requests specific information to aid in deciding if the position at issue is permanent and full time, the employer must provide it. **Collectors International, Ltd.**, 89 INA 133 (Dec. 14, 1989). Where a fact is not capable of proof by independent documentation, however, the testimony of the persons involved may be the only source available to establish such fact. It follows that the weight to be accorded statements that are not capable of support by independent documentation depends largely on the credibility of the person making the statement. The Board has held in this context that the credibility of the speaker who has furnished the evidence depends, in turn, on (1) the surrounding facts and circumstances; (2) the source of knowledge of the speaker; (3) the interest of the speaker; (4) the good or bad intentions of the speaker; (5) the manner of testimony by the speaker; and (6) other indices of honesty or credibility. **Mr. and Mrs. Jeffrey Hines**, 88 INA 510 (April 9, 1990). Consequently, although the CO's findings may not be based on pure speculation, the CO is not required to accept undocumented statements of an employer that are inconsistent, illogical, or otherwise not capable of belief.

Turning to the record in this case, we find that the CO correctly concluded that the Employer did not sustain her burden of proving that the Alien's duties will be limited to cooking, and that the worker will not be required to perform any of the other duties associated with maintaining a household, including mopping, dusting, washing and ironing clothes, answering the telephone.

(2) Employer represents that her need for a full time cook derives from her requirement for a diet low in cholesterol, sugar and sodium due to an unspecified health problem. Although she submitted recipes that meant to represent the diet she requires as documentation to support her proof of the full time nature of the position, these exhibits clearly do not speak for themselves nor do they inherently exemplify a medically prescribed regimen without expert evidence. Moreover, those recipes did not appear consistent with the list of typical dishes the household cook will prepare that was set forth in the application in form ETA 750A.

Finally, the rebuttal statements as to how the other household tasks will be performed were not consistent with the Employer's earlier representations, and she failed to clarify the prior cooking arrangements in her vague references to an unidentified relative as having done that work. For these reasons we return to our previous comment that that the acceptance of an employer's undocumented statements requires that they be both credible and consistent with the record as a whole. As we cannot find this such credibility in Employer's representations, we

conclude that the CO properly denied certification in this case.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 95 INA 672

MARGUERITE GORMAN, Employer
ELZBIETA SOFIA SZOSTEK, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

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	:	CONCUR	:	DISSENT	:	COMMENT	:
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Holmes	:	:	:	:	:	:	:
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Huddleston	:	:	:	:	:	:	:
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Thank you,

Judge Neusner

Date: July 24, 1997